Ketua Pengarah Hasil Dalam Negeri v TCY Jaya Sdn Bhd (formerly known as Sykt Tan Chang Yong Holding Sdn Bhd)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-347–06 OF 2021
ABDUL KARIM, CHE MOHD RUZIMA AND SEE MEE CHUN JJCA
1 NOVEMBER 2023

Revenue Law — Income tax — Appeal against assessment — Whether disputed payments were payments of all outgoings and expenses wholly and exclusively incurred in production of gross income — Whether disputed payments were allowable under sub-s 33(1) of Income Tax Act 1967 — Whether disputed payments were subject to restriction under para 39(1)(g) of Income Tax Act 1967 — Whether Director General of Income Tax had properly exercised his discretion in imposing penalty pursuant to sub-s 113(2) of Income Tax Act 1967 — Income Tax Act 1967 ss 33(1), 39(1)(g), 99 & 113(2)

The respondent was a company that was involved in the business of buying and selling timber logs. The Director General of Inland Revenue ('the DGIR') had made additional assessments in respect of years of assessment ('YA') 2004 and 2005 amounting to RM186,636.11 and RM295,818.85 respectively against the respondent. Aggrieved, the respondent appealed to the Special Commissioners of Income Tax ('SCIT') pursuant to s 99 of the Income Tax Act 1967 ('the ITA'). By majority, the SCIT held that the respondent had proved that it was entitled to tax deductions under s 33(1) of the ITA for expenses incurred for the purchase of timber from Keck Eng Timber ('KET') and allowed the respondent's appeal. On appeal, the learned High Court judge ('the LHCJ') agreed with the SCIT's decision and dismissed DGIR's appeal with cost, hence, the present appeal. The main questions of law arose were: (a) the issue of the status of the disputed payments made by the respondent to KET in YA 2004 dan 2005; and (b) if the disputed payments were allowable under sub-s 33(1) of the ITA, whether the said disputed payments were subject to the restriction under para 39(1)(g) of the ITA — in relation to this issue, the respondent submitted that considering that the DGIR had dropped this issue, hence, DGIR could not revisit this issue and that the principle of estoppel was applicable against DGIR. There was also an issue raised regarding the penalty imposed by DGIR against the respondent pursuant to s 113 of the ITA.

Held, allowing DGIR's appeal and setting aside the judgment of the High Court and the decision of the SCIT with cost of RM20,000 here and below to be awarded to DGIR subject to the allocator:

(1) The court found that there were inconsistencies in the finding of the SCIT. At sub-para 8(vii) of the finding of facts, the SCIT found that the respondent entered into an oral agreement to purchase timber from KET, a transaction that involved payment of outgoings and expenses incurred in the production of gross income that enabled the respondent to make a deduction under sub-s 33(1) of the ITA. However, in the same finding of facts in sub-para 8(ix), the SCIT made a contradictory finding that the respondent did not have any timber concession to sell timber and it had purchased the timber concession from KET, a transaction involved payment that would constitute either payment for the use of licence or permit to extract timber which the deduction from the gross income was disallowed under para 39(1)(g) of the ITA (see para 17).

(2) Based on the contemporaneous evidence, the court found that SCIT's finding of fact in sub-para 8(ix) of the case stated was correct as compared to the facts found in sub-para 8(vii), that was, the respondent had purchased the timber concession from KET. The court's view was in line with the nature of the right given to the respondent in the agreement between KET and the respondent ('the said agreement'). The exclusivity of the right given to the respondent to extract and remove all merchantable timber from the concession area was akin to the right of a concessionaire. Coupled with the fact that the amount to be paid by the respondent to KET was in a fixed sum regardless of the number of the standing logs available in the concession area, negated the proposition that the said agreement was for the purchase of timber or standing logs. Therefore, even though the disputed payments could be considered as outgoings and expenses wholly and exclusively incurred in the production of gross income, and claimable for deduction of tax under sub-s 33(1) of the ITA, regard must be made to the restriction as stipulated under para 39(1)(g) of the ITA (see paras 29 & 32).

(3) The law on estoppel by words or conduct against the statutory provision was well settled. Guided by the clear settled principle of law enunciated in the case law authorities, the court found that DGIR was not estopped from raising the issue of the restriction stipulated under para 39(1)(g) of the ITA even though the matter was abandoned before the SCIT and not argued before the High Court (see para 34).

(4) Based on the court's finding that the SCIT had made a correct finding of fact in sub-para 8(ix) of the case stated, the disputed payments fell under the category of any sum paid for the use of a licence or permit to extract timber from the concession area. Thus, the respondent was prohibited from claiming deduction under sub-s 33(1) of the ITA by virtue of para 39(1)(g) of the ITA. In such a situation, the court found that the LHCJ had failed to exercise his appellate function to consider and decide on the question of law, that was, whether the SCIT had correctly

addressed the law in determining whether the respondent was entitled to deduct the disputed payments as its cost of producing gross income under sub-s 33(1) of the ITA by virtue of the restriction under para 39(1)(g) of the ITA. The SCIT and the High Court had erred in law by arriving at a conclusion not supported by the facts found and thereby applying the wrong provision of law in determining the appeal (see paras 35–36).

(5) Under sub-s 113(2) of the ITA, if a taxpayer was not prosecuted, the DGIR may require the taxpayer to pay a penalty equal to the amount of tax that was undercharged due to the incorrect returns. In other words, DGIR had discretionary power to impose a penalty up to 100% of the amount of tax due. By the nature of the business transaction with KET, that was, the respondent had bought the timber concession and was under obligation to pay all expenses including the licence fee to extract the timber, the respondent should have known that the disputed payments were prohibited from claiming deduction as provided under para 39(1)(g) of the ITA. It was a general legal principle that ignorance of the law was no defence — *ignorantia juris non excusat*. The respondent could not claim ignorance of the clear provision of law. Further, good faith was not a defence against the imposition of penalty under sub-s 113(2) of the ITA. Having considered the fact and the applicable law, the court found that DGIR had correctly exercised his discretion pursuant to sub-s 113(2) of the ITA. There was no reason for the court to disturb DGIR's discretion in imposing a penalty of 45% for incorrect returns, instead of 100% allowable under the law. There were therefore merits in DGIR's appeal which warranted appellate intervention (see paras 38–41).

[Bahasa Malaysia summary

Responden merupakan sebuah syarikat yang terlibat dalam perniagaan jual beli kayu balak. Ketua Pengarah Lembaga Hasil Dalam Negeri ('KPLHDN') telah membuat taksiran tambahan berkenaan dengan tahun taksiran ('TT') 2004 dan 2005 masing-masing berjumlah RM186,636.11 dan RM295,818.85 terhadap responden. Terkilan, responden merayu kepada Pesuruhjaya Khas Cukai Pendapatan ('PKCP') menurut s 99 Akta Cukai Pendapatan 1967 ('ACP'). Secara majoriti, PKCP berpendapat bahawa responden telah membuktikan bahawa ia layak mendapat potongan cukai di bawah s 33(1) ACP bagi perbelanjaan yang ditanggung untuk pembelian kayu daripada Keck Eng Timber ('KET') dan membenarkan rayuan responden. Di atas rayuan, hakim Mahkamah Tinggi ('HMT') bersetuju dengan keputusan PKCP dan menolak rayuan KPLHDN dengan kos, justeru, rayuan semasa. Persoalan-persoalan undang-undang utama yang timbul ialah: (a) isu status bayaran yang dipertikaikan yang dibuat oleh responden kepada KET pada TT 2004 dan 2005; dan (b) jika bayaran yang dipertikaikan dibenarkan di bawah

A sub-s 33(1) ACP, sama ada pembayaran yang dipertikaikan tersebut tertakluk kepada sekatan di bawah perenggan 39(1)(g) ACP — berhubung dengan isu ini, responden berhujah bahawa memandangkan KPLHDN telah menggugurkan isu ini, maka KPLHDN tidak boleh menyemak semula isu ini dan prinsip estopel adalah terpakai terhadap KPLHDN. Terdapat juga isu yang B dibangkitkan mengenai penalti yang dikenakan oleh KPLHDN terhadap responden menurut s 113 ACP.

Diputuskan, membenarkan rayuan KPLHDN, dan mengenepikan penghakiman Mahkamah Tinggi dan keputusan PKCP dengan kos sebanyak C RM20,000 di sini dan di bawah diawardkan kepada KPLHDN tertakluk kepada alokator:

(1) Mahkamah mendapati terdapat percanggahan dalam dapatan PKCP. Pada sub-perenggan 8(vii) dapatan fakta, PKCP mendapati bahawa D responden menandatangani perjanjian lisan untuk membeli kayu daripada KET, satu transaksi yang melibatkan pembayaran keluar dan perbelanjaan yang ditanggung dalam penghasilan pendapatan kasar yang membolehkan responden untuk membuat potongan di bawah sub-s 33(1) ACP. Walau bagaimanapun, dalam dapatan fakta yang sama E dalam sub-perenggan 8(ix), PKCP membuat dapatan yang bercanggah bahawa responden tidak mempunyai apa-apa konsesi kayu untuk menjual kayu dan ia telah membeli konsesi kayu daripada KET, transaksi yang melibatkan pembayaran yang akan membentuk sama ada bayaran untuk penggunaan lesen atau permit untuk mengeluarkan kayu yang F mana potongan daripada pendapatan kasar tidak dibenarkan di bawah perenggan 39(1)(g) ACP (lihat perenggan 17).

(2) Berdasarkan keterangan kontemporari, mahkamah mendapati bahawa dapatan fakta PKCP dalam sub-perenggan 8(ix) kes dinyatakan adalah G betul berbanding fakta yang terdapat dalam sub-perenggan 8(vii), iaitu responden telah membeli konsesi kayu daripada KET. Pandangan mahkamah adalah selaras dengan sifat hak yang diberikan kepada responden dalam perjanjian antara KET dan responden ('perjanjian tersebut'). Hak eksklusif yang diberikan kepada responden untuk H mengekstrak dan mengeluarkan semua kayu yang boleh diniagakan dari kawasan konsesi adalah serupa dengan hak pemegang konsesi. Ditambah dengan fakta bahawa jumlah yang perlu dibayar oleh responden kepada KET adalah dalam jumlah tetap tanpa mengira bilangan kayu balak yang terdapat di kawasan konsesi, menafikan cadangan bahawa perjanjian I tersebut adalah untuk pembelian kayu atau kayu balak. Oleh itu, walaupun bayaran yang dipertikaikan boleh dianggap sebagai pembayaran dan perbelanjaan yang ditanggung sepenuhnya dan secara eksklusif dalam penghasilan pendapatan kasar, dan boleh dituntut untuk potongan cukai di bawah sub-s 33(1) ACP, perhatian mesti diberikan

kepada sekatan seperti yang ditetapkan di bawah perenggan 39(1)(g) ACP (lihat perenggan 29 & 32). A

(3) Undang-undang mengenai *estoppel* melalui perkataan atau kelakuan terhadap peruntukan berkanun adalah mantap. Berpandukan prinsip undang-undang yang jelas dinyatakan dalam autoriti undang-undang kes, mahkamah mendapati KPLHDN tidak dihalang daripada membangkitkan isu sekatan yang ditetapkan di bawah perenggan 39(1)(g) ACP walaupun perkara tersebut telah ditinggalkan sebelum ini di hadapan PKCP dan tidak dihujahkan di hadapan Mahkamah Tinggi (lihat perenggan 34). B C

(4) Berdasarkan dapatan mahkamah bahawa PKCP telah membuat dapatan fakta yang betul dalam sub-perenggan 8(ix) kes dinyatakan, bayaran yang dipertikaikan adalah di bawah kategori mana-mana jumlah yang dibayar untuk penggunaan lesen atau permit untuk mengeluarkan kayu daripada kawasan konsesi. Oleh itu, responden dilarang menuntut potongan di bawah sub-s 33(1) ACP menurut perenggan 39(1)(g) ACP. Dalam keadaan sedemikian, mahkamah mendapati bahawa HMT telah gagal menjalankan fungsi rayuannya untuk mempertimbangkan dan memutuskan persoalan undang-undang, iaitu, sama ada PKCP telah menangani undang-undang dengan betul dalam menentukan sama ada responden berhak memotong bayaran yang dipertikaikan tersebut sebagai kos untuk menjana pendapatan kasar di bawah sub-s 33(1) ACP berdasarkan sekatan di bawah perenggan 39(1)(g) ACP. PKCP dan Mahkamah Tinggi telah terkhilaf dari segi undang-undang dengan membuat kesimpulan yang tidak disokong oleh fakta yang ditemui dan dengan itu menggunakan peruntukan undang-undang yang salah dalam menentukan rayuan (lihat perenggan 35–36). D E F

(5) Di bawah sub-s 113(2) ACP, jika pembayar cukai tidak didakwa, KPLHDN boleh menghendaki pembayar cukai membayar penalti yang sama dengan jumlah cukai yang kurang dicaj disebabkan penyata cukai yang salah. Dalam erti kata lain, KPLHDN mempunyai kuasa budi bicara untuk mengenakan penalti sehingga 100% daripada jumlah cukai yang perlu dibayar. Berdasarkan sifat urus niaga perniagaan dengan KET, iaitu, responden telah membeli konsesi balak dan bertanggungjawab untuk membayar semua perbelanjaan termasuk yuran lesen untuk mengeluarkan kayu, responden sepatutnya tahu bahawa bayaran yang dipertikaikan adalah dilarang daripada menuntut potongan seperti yang diperuntukkan di bawah perenggan 39(1)(g) ACP. Ia adalah prinsip undang-undang umum bahawa kejahilan undang-undang bukanlah pembelaan — *ignorantia juris non excusat*. Responden tidak boleh mendakwa tidak mengetahui peruntukan undang-undang yang jelas. Selanjutnya, niat baik bukanlah pembelaan terhadap pengenaan penalti di bawah sub-s 113(2) ACP. Setelah mempertimbangkan fakta dan G H I

undang-undang yang terpakai, mahkamah mendapati KPLHDN telah menggunakan budi bicaranya dengan betul menurut sub-s 113(2) ACP. Tiada sebab untuk mahkamah mengganggu budi bicara KPLHDN dalam mengenakan penalti sebanyak 45% bagi penyata cukai yang salah, bukannya 100% seperti yang dibenarkan di bawah undang-undang. Oleh itu, terdapat merit dalam rayuan KPLHDN yang memerlukan campur tangan rayuan (lihat perenggan 38–41).]

Cases referred to

Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal [2011] 6 MLJ 297; [2011] 8 CLJ 766, FC (refd)

Chua Lip Kong v Director-General of Inland Revenue [1982] 1 MLJ 235, PC (refd)

Director-General of Inland Revenue v Khoo Ewe Aik Realty Sdn Bhd [1990] 2 MLJ 415, SC (refd)

Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd [1991] 1 MLJ 404; [1991] 1 CLJ Rep 174, SC (folld)

Ketua Pengarah Hasil Dalam Negeri v Classic Japan (M) Sdn Bhd [2022] 3 MLJ 894, CA (refd)

Ketua Pengarah Hasil Dalam Negeri v Kim Thye & Co [1992] 2 MLJ 708, SC (refd)

Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] 1 MLJ 49; [1964] 1 All ER 300, PC (folld)

Puran Singh v Kehar Singh; Bahadur Singh [1939] 1 MLJ 71 (folld)

Syarikat Ibraco-Peremba Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2017] 2 MLJ 120, CA (refd)

Teruntum Theatre Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2006] 4 MLJ 685, CA (folld)

Verschures Creameries, Ltd v Hull and Netherlands Steamship Co, Ltd [1921] All ER Rep 215; [1921] 2 KB 608, CA (refd)

Yamamori (Hong Kong) Ltd v Davidson & Ors [1992] 2 MLJ 410, HC (refd)

Legislation referred to

Income Tax Act 1967 ss 33(1), 39(1)(g), 99, 113, 113(1), (2), Schedule 5, para 34

Appeal from: *Ketua Pengarah Hasil Dalam Negeri v TCY Jaya Sdn Bhd (sebelum ini dikenali sebagai Syarikat Tan Chang Yong Holdings Sdn Bhd)* [2022] MLJU 860 (High Court, Kuala Lumpur)

Ahmad Isyak bin Mohd Hassan (with Syazana Safiah Rozman) (Inland Revenue Board of Malaysia) for the appellant.

Francis Tan Leh Kiah (with Brandon Shen Shi Han) (Azman Davidson & Co) for the respondent.

Che Mohd Ruzima JCA:

INTRODUCTION

[1] Aggrieved by the additional assessment made by the Director General of Inland Revenue ('DGIR') in respect of Year of Assessment ('YA') 2004 and 2005 in the amount of RM186,636.11 and RM295,818.85 respectively, TCY Jaya Sdn Bhd ('TCY') appealed to the Special Commissioners of Income Tax ('SCIT') pursuant to s 99 of the Income Tax Act 1967 ('the ITA 1967'). By a majority decision, SCIT allowed TCY's appeal. Dissatisfied with the decision, DGIR appealed to the High Court. At the High Court, the learned High Court judge ('LHCJ') found that the SCIT had considered the testimonies of witnesses and all documents tendered in deciding the obligation of TCY to pay the additional assessments and there was no error in its determination on the questions of law based on the evidence before it and in its application to the facts to warrant intervention by the court. The LHCJ dismissed the DGIR appeal with cost. Aggrieved by the said decision, the DGIR appealed to this court.

BRIEF FACTS

[2] TCY is a taxpayer. The principal business activity of TCY is connected with logging and the buying and selling of timber logs. It has business premises in Segamat, Johor. From 5 November 2007 to 7 November 2007, the DGIR conducted a tax audit at TCY's business premises.

[3] As a consequence of the tax audit, DGIR issued an additional notice of assessment dated 16 July 2009 which disallowed TCY's claim for the deduction in the sums of RM1,148,000 for the payment made to Keck Eng Timber ('KET') in YA 2004, and the additional assessment and penalty charged against TCY was RM186,636.11.

[4] For the same reason, the DGIR issued another additional notice of assessment dated 25 March 2010 against TCY for the amount of RM896,000 for YA 2005, and the additional assessment and penalty charged was RM295,818.85.

[5] Dissatisfied with the additional assessments, TCY filed notices of appeal in form Q to SCIT dated 16 July 2009 and 25 March 2010 respectively. Both TCY's appeals were heard together on 1 April 2012, 23 August 2012, 19 September 2012 and 19 October 2012, and the decision of the SCIT was delivered on 22 August 2014.

[6] The findings of facts by the SCIT as mentioned in para 8 of the case

stated dated 29 June 2020 are as follows:

(a) Responden telah menjalankan audit di tempat perniagaan Perayu di Segamat pada 5.11.2007 sehingga 7.11.2007.

(b) Semasa audit dijalankan Responden dimaklumkan oleh Perayu bahawa tiada perjanjian bertulis diantara Perayu untuk membeli balak dengan Keck Eng Timber.

(c) Perayu mendakwa bahawa perbelanjaan berjumlah RM1,148,000.00 pada tahun TT 2004 dan RM896,000.00 pada tahun TT 2005 adalah kos pembelian balak daripada Keck Eng Timber.

(d) Perayu mendakwa bahawa ujudnya perjanjian lisan untuk membeli balak daripada Keck Eng Timber atas dasar persahabatan dalam perniagaan.

(e) Perayu telah menjadikan perjanjian lisan untuk membeli balak dengan Keck Eng Timber kepada perjanjian bertulis yang telah dimatikan setem hasil.

(f) Keck Eng Timber memperolehi hak untuk memotong balak daripada konsesi balak kepunyaan KDYMM Sultan Pahang.

(g) Perayu memasuki perjanjian lisan untuk membeli balak daripada Keck Eng Timber.

(h) Perayu telah mengupah kontraktor Kemajuan Sinar Trading Sdn. Bhd. untuk memasuki kawasan konsesi balak untuk memotong balak.

(i) Perayu tidak mempunyai konsesi balak dan untuk menjual balak Perayu telah membeli konsesi balak daripada Keck Eng Timber.

(j) Saksi Responden bersetuju ujudnya kos untuk membeli balak dan mengatakan anggaran yang diberikan ialah RM7,000.00 seekar adalah terlalu tinggi.

(k) Peguam Responden telah menggugurkan isu sama ada bayaran adalah berbentuk modal dan tidak dibenarkan di bawah seksyen 39(1) Akta.

THE SCIT DECISION

[7] By majority, the SCIT held that TCY has proved that it is entitled to tax deductions under s 33(1) of the ITA 1967 for expenses incurred for the purchase of timber and allowed TCY's appeal. The deciding order dated 22 August 2014, inter alia, was as follows:

> ADALAH DIPUTUSKAN SECARA MAJORITI bahawa peruntukan belian untuk mendapatkan konsesi balak sebanyak RM1,148,000.00 bagi Tahun Taksiran 2004 dan berjumlah RM896,000.00 bagi Tahun Taksiran 2005 boleh dibenarkan sebagai perbelanjaan di bawah subseksyen 33(1) Akta Cukai Pendapatan 1967;
>
> ADALAH DIPUTUSKAN SECARA MAJORITI bahawa penalti yang dikenakan di bawah seksyen 113(2) Akta Cukai Pendapatan 1967 bagi Tahun-Tahun Taksiran 2004 dan 2005 berkaitan dengan rayuan ini diketepikan;

MAKA DENGAN INI ADALAH DIPERINTAHKAN SECARA MAJORITI bahawa rayuan ini dibenarkan.

[8] However, by way of a minority decision, the learned panel chair held that TCY's substantive appeal should not be allowed because TCY had only made payments to KET in 2010 and 2011 and is entitled to deduct the disputed expenses in the YA 2010 and 2011, not as part of its expenditure for the YA 2004 and 2005. In relation to the issue of imposition of penalty under sub-s 113(2) of the ITA 1967, the learned panel chair agreed with the majority that no penalty should be imposed.

[9] Aggrieved by the decision of the SCIT, the DGIR filed a notice of appeal to the High Court.

THE HIGH COURT DECISION

[10] The SCIT had considered the testimonies of the witnesses and the relevant documents in determining the obligation of TCY to pay tax for the payments made to KET in YA 2004 and 2005. There was no error in the SCIT's majority decision on the questions of law based on the evidence before it and in its application to the facts to warrant intervention by the court.

[11] As for the minority decision of the learned panel chair, there is an error of law in the decision. The word incurred does not only mean paid, an expenditure can be incurred without actually being disbursed. Therefore, it is irrelevant that TCY had only paid off the amount due under the merchantable timber purchase agreement in 2010 and 2011 since the crucial date is the date of the expenditure incurred, that is in 2004 and 2005.

[12] As regard to the penalty under sub-s 113(2) of the ITA 1967, the SCIT is correct in determining that TCY should not be subject to any penalty in circumstances where the DGIR had mechanically imputed the penalty without proper consideration of relevant circumstances of the case and had been changing its basis in raising assessments thereby causing hardship to TCY. In addition, sub-s 113(1) and (2) of the ITA 1967 does not cover situations where there is a difference of opinion on the interpretation of a particular provision of the act even where the court ultimately finds in favour of the appellant.

THE APPEAL

[13] Being dissatisfied with the decision of the High Court, DGIR appealed to this court. 14 grounds of appeal were listed in the memorandum of appeal. However, the learned senior revenue counsel ('SRC') in his submission condensed all issues into one, that is, whether based on the facts found and

stated by the SCIT, the decision of the High Court is correct in law. Meanwhile, the learned counsel for TCY submitted that the main issue for determination in this appeal is whether the High Court and the SCIT were wrong in law to determine that the disputed expenses claimed by TCY as its cost of producing its gross income should be allowed under sub-s 33(1) of the ITA 1967.

OUR DECISION

[14] The law on appeal from the SCIT to the High Court is trite. Paragraph 34 of Schedule 5 of the ITA 1967 stipulates that:

> 34 Either party to proceedings before the Special Commissioners may appeal on a question of law against a deciding order made in those proceedings (including a deciding order made pursuant to paragraph 26(b) or (c) by requiring the Special Commissioners to state a case for the opinion of the High Court and by paying to the Clerk at the time of making the requisition such fee as may be prescribed from time to time by the Minister in respect of each deciding order against which he seeks to appeal.

[15] In *Chua Lip Kong v Director-General of Inland Revenue* [1982] 1 MLJ 235 the Privy Council dealt with the question of whether the appellate court can interfere with the primary facts found by the SCIT. At p 236, Lord Diplock held as follows:

> Their Lordships cannot stress too strongly how important it is that, in every case stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded. Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself; occasionally they may be insufficient to enable the High Court to decide the question of law sought to be raised by the case stated, but in that event, it will be necessary for the case to be remitted to the Commissioners themselves for further findings. It is the primary facts so found by the Commissioners that they should set out in the case stated as having been 'admitted or proved'.

In *Director-General of Inland Revenue v Khoo Ewe Aik Realty Sdn Bhd* [1990] 2 MLJ 415, Gunn Chit Tuan SCJ delivering the decision of the Supreme Court held that:

> It is hardly necessary for any lawyer to be reminded that under our Income Tax Act 1967(paras 34, 39, 41 and 42 of Schedule 5 of the Income Tax Act 1967) one may only appeal to the High Court and thence to the Supreme Court on a question of law. The decision of the Special Commissioners of Income Tax as to the facts is therefore conclusive. In this connection, it is interesting to note the following statement by Lord Denning on the powers of the High Court on appeal in *Griffiths (Inspector of Taxes) v JP Harrison (Watford) Ltd* [1962] 1 All ER 909 at p 916:

> Now the powers of the High Court on an appeal are very limited. The judge cannot reverse the commissioners on their findings of fact. He can only reverse their decision if it is 'erroneous in point of law'. Now here the primary facts were all found by the commissioners. They were stated in the case. They cannot be disputed. What is disputed is their conclusion from them. It is now settled, as well as anything can be, that their conclusion cannot be challenged unless it was unreasonable, so unreasonable that it can be dismissed as one which could not reasonably be entertained by them. It is not sufficient that the judge would himself have come to a different conclusion. Reasonable people on the same facts may reasonably come to different conclusions: and often do. Juries do. So do judges. And are they not all reasonable men? But there comes a point when a judge can say that no reasonable man could reasonably come to that conclusion. Then, but not till then, he is entitled to interfere.

A court would not therefore disturb findings of fact by the Special Commissioners unless it considers that the only reasonable conclusion on the evidence contradicts the determination of the Special Commissioners (see *Edwards (HM Inspector of Taxes) v Bairstow & Harrison* 36 TC 207, *Director-General of Inland Revenue v LCW* [1975] 1 MLJ 250 at p 251 and *Kota Kinabalu Industries Sdn Bhd v Director General of Inland Revenue* [1981] 2 MLJ 186 at p 190).

[16] Back to the appeal before us, the primary finding of facts made by the SCIT can be seen in para 8 of the case stated, see pp 73 and 74 common core bundle ('CCB') in encl 14, and is reproduced in para [6] above. To determine whether the TCY's disputed payments to KET in YA 2004 and 2005 were payments of all outgoings and expenses wholly and exclusively incurred in the production of gross income to enable TCY to make a deduction as provided under sub-s 33(1) of the ITA 1967, the facts finding by the SCIT is pertinent. For ease of reference, the provision under sub-s 33(1) of the ITA 1967 is as follows:

> 33 Adjusted income generally
>
> (1) Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source, including —
>
> ...

[17] Upon perusing the facts found by the SCIT, we are of the view that there are inconsistencies in the said finding. At sub-para 8(vii) of the finding of facts, the SCIT found that TCY entered into an oral agreement to purchase timber from KET, a transaction that involved payment of outgoings and expenses incurred in the production of gross income that enabled TCY to make a deduction under sub-s 33(1) of the ITA 1967. However, in the same finding of facts in sub-para 8(ix), the SCIT made a contradictory finding that TCY does not have any timber concession to sell timber and it had purchased the timber

concession from KET, a transaction involved payment that would constitute either payment for the use of licence or permit to extract timber which the deduction from the gross income is disallowed under para 39(1)(g) of the ITA 1967. Again, for ease of reference, the provision under para 39(1)(g) of the ITA 1967 is as follows:

> 39 Deductions not allowed
>
> (1) Subject to any express provision of this Act, in ascertaining the adjusted income of any person from any source for the basis period for a year of assessment no deduction from the gross income from that source for that period shall be allowed in respect of —
>
> ...
>
> (g) any sum, by whatever name called, payable (otherwise than to a State Government or with the approval of the Minister, a statutory authority, or other body the capital or fund of which is wholly or substantially owned by a State Government or a statutory authority) for the use of a licence or permit to extract timber from a forest in Malaysia;

[18] Obviously, from the finding of facts as listed in the case stated, we observed that the SCIT itself is not certain of the status of the disputed payments made by TCY to KET in YA 2004 and 2005. Based on the uncertainty in the finding of facts, we are of the view that the SCIT is incapable of making a correct decision in addressing the issue at hand. From the grounds of judgment ('GOJ'), the LHCJ failed to address his mind on the said uncertainty.

[19] Besides that, we also observed and considered the submission raised by the learned SRC that there is another glaring error of law committed by the SCIT as reflected in the deciding order where the SCIT stated as follows:

> ADALAH DIPUTUSKAN SECARA MAJORITI bahawa peruntukan belian untuk mendapatkan konsesi balak sebanyak RM1,148,000.00 bagi Tahun Taksiran 2004 dan berjumlah RM896,000.00 bagi Tahun Taksiran 2005 boleh dibenarkan sebagai perbelanjaan di bawah subseksyen 33(1) Akta Cukai Pendapatan 1967.

The learned SRC submitted that since the SCIT found that the disputed payments were for the purchase of timber concession as opposed to the purchase of timber or standing logs, the decision that such payments are allowable under sub-s 33(1) of the ITA 1967 is manifestly wrong in law. This is because the effect of the finding that the payments were for the purchase of timber concession is, the payments would then constitute either payments for the use of a licence or permit to extract timber in which the deduction is disallowed under para 39(1)(g) of the ITA 1967.

[20] From the above observations, we find that there are two main questions of law that need to be addressed and decided by the High Court. Firstly, on the issue of the status of the disputed payments made by TCY to KET in YA 2204 dan 2005, and secondly, if the disputed payments are allowable under sub-s 33(1) of the ITA 1967, whether the said disputed payments are subject to the restriction under para 39(1)(g) of the ITA 1967.

FIRST ISSUE — STATUS OF THE DISPUTED PAYMENTS

[21] It is an undisputed fact that TCY entered into an agreement with KET to extract and remove the timber from the concession owned by KDYMM Sultan of Pahang. In the beginning, there was only an oral agreement between TCY and KET. Then, TCY turned the oral agreement to a written agreement dated 3 March 2004 and was stamped on 12 March 2004 ('the said agreement'). See CCB at pp 140–142 in encl 14.

[22] TCY claimed that the said agreement was entered into to buy timber or standing logs from KET, not the timber concession. Therefore, the disputed payments were the cost of producing gross income and they were deductible under sub-s 33(1) of the ITA 1967. In contrast, the DGIR took a different stand. It was argued that the tax audit shows that TCY acquired a timber concession from KET.

[23] As mentioned before, the LHCJ did not address this issue in his GOJ. To determine the dispute, we need to sieve through the appeal records. Unfortunately, no notes of evidence before the SCIT were produced in the appeal records even though the case stated clearly mentioned that two witnesses, each one witness from TCY and the DGIR had given oral testimony before the SCIT. Be that as it may, there are other documents and numerous correspondences between TCY and the DGIR in the appeal records that can be taken into consideration when it comes to a judicial fact finding process. Those relevant documents and correspondences were listed in the CCB encl 15, and can be considered as contemporaneous evidence in determining the status of the disputed payments.

[24] To begin with, we refer to said agreement. In recital (A), it is stated that KET has secured the exclusive right to extract and remove all merchantable timber from the concession area in compartments 96-A and 97-A. In recital (B), KET agreed to sell and TCY agreed to purchase all merchantable timber found at the concession area subject to the terms and conditions, among others, as follows:

1. In consideration of the sum of Ringgit Malaysia: Two Million Forty-four Thousand Only (RM2,044,000.00), (hereinafter referred to as 'the Purchase Price'). The 1st Party hereby agrees to sell and the 2nd Party

A hereby agrees to Purchase all merchantable timber found at the Concession Area subject to the terms and conditions hereinafter appearing.

2. All expenses payable to Jabatan Perhutanan Negeri Pahang stated in the Letter of Award dated 29th April 2003 and 13th June 2003, necessary for issuance of logging license for all the compartments and the Concession Area shall be the responsibility of the 2nd Party.

B

3. Any increase in the payment of the above expenses as stated in clause 2, especially payment of premium shall be borne by the 2nd Party.

C

4. The 2nd Party shall have the exclusive right to manage all matters relating to logging activities at the Concession Area especially concerning extraction and selling of timber logs.

5. All timber logs extracted from the said Concession Area shall be sold by the 2nd Party and all proceeds of sale shall belong to 2nd Party absolutely.

D

6. The 2nd Party shall perform the logging activities strictly in accordance withal the rules and regulations set by Jabatan Perhutanan.

From the terms and conditions of the said agreement, we conclude that it reveals the following facts:

E

(a) TCY secured the exclusive right from KET to manage all matters relating to logging activities at the concession area;

(b) TCY own all the extracted timber and has the right of disposal and all proceeds thereto absolutely belong to TCY; and

F

(c) TCY is to bear all the expenses payable to Jabatan Perhutanan Negeri Pahang as stated in the letter of award dated 29 April 2003 and 13 June 2003.

G **[25]** The other contemporaneous evidence that needs to be taken into consideration is the correspondence between the parties. We observed that the earlier correspondences from TCY's tax agent to the DGIR alluded that the disputed payments are for the purchase of timber concession, and not for timber or standing logs. Via a letter dated 9 April 2008, see CCB at pp 295–297 in encl 15, TCY's tax agent in its appeal to the DGIR, inter alia, submitted as follows:

H

Tahun taksiran 2004

(a) Perjanjian jual beli konsesi

I Untuk makluman tuan, pelanggan kami telah memasuki *satu urusniaga berkaitan pembelian kawasan balak dengan pihak penjual, Keck Eng Timber*. *Kawasan balak berkenaan adalah berkaitan dengan kawasan kurniaan KDYMM Sultan Pahang di daerah Lipis, Pahang Darul Makmur*. *Kawasan Konsesi balak berkenaan meliputi kompartmen 96-A dan 97-A*, Hutan Simpan Ulu Jelai, Daerah Lipis, Pahang Darul Makmur.

Bersama-sama ini kami kemukakan dokumen-dokumen berikut berkaitan dengan urusniaga berkenaan seperti berikut untuk tindakan pihak tuan selanjutnya: A

(a) *Perjanjian pembelian kawasan konsesi balak* di antara Keck Eng Timber (penjual) dan Tan Chang Yong Holding Sdn Bhd (pembeli);

(b) Surat kelulusan daripada Jabatan Perhutanan Negeri Pahang berhubung kelulusan kawasan pembalakan di atas kompartmen 96-A, Hutan Simpan Ulu Jelai, daerah Lipis, Pahang Darul Makmur bertarikh 29 April 2003; dan B

(c) Surat kelulusan daripada Jabatan Perhutanan Negeri Pahang berhubung kelulusan kawasan pembalakan di atas kompartmen 97-A, Hutan Simpan Ulu Jelai, daerah Lipis, Pahang Darul Makmur bertarikh 13 Jun 2003. (Emphasis added.) C

Subsequent correspondences from TCY's tax agent to DGIR dated 7 July 2008 (see CCB at pp 175–177 in encl 15), 11 December 2008 (see CCB at pp 203–205 in encl 15), 22 December 2008 (see CCB at pp 206–209 in encl 15) and 6 January 2009 (see CCB at pp 211–217 in encl 15) also clearly show that TCY had admitted to the fact that the said agreement is for the purchase of the timber concession and not for buying timber or standing logs from KET. D E

[26] Then, by a letter dated 26 February 2009 (see CCB at pp 219 in encl 15) the DGIR responded to TCY's tax agent letter dated 6 January 2009. In the said letter, the DGIR expresses his view on TCY's expenses in relation to the disputed payments as follows: F

2. Adalah dimaklumkan, berdasarkan kepada fakta-fakta kes yang diterima perbelanjaan yang dilakukan adalah perbelanjaan untuk mendapatkan hak penebangan balak dan bukan pembelian kayu balak dari Keck Eng Timber.

3. Oleh itu Lembaga Hasil Dalam Negeri Malaysia berpendapat perbelanjaan yang dibayar kepada Keck Eng Timber tidak layak mendapat potongan cukai di bawah seksyen 39(1)(g) Akta Cukai Pendapatan 1967. G

Consequent to that, TCY changed its stance. Thereafter, the correspondence sent by TCY's tax agent to the DGIR no longer refers to the purchase of timber concessions. Instead, the said agreement is said to be for the purchase of timber or standing logs, see TCY's tax agent letter dated 23 March 2009 at pp 221–225 CCB, 11 May 2009 at pp 227–229 CCB, 8 June 2009 at pp 230–236 CCB and 16 June 2009 at pp 238–246 CCB, all in encl 15. H

[27] Apart from those contemporaneous evidence, there is another relevant fact that is not disputed by TCY. The fact is that TCY had paid all expenses under the said agreement. First and foremost, TCY admitted that it paid the royalty and the premium for 164 acres of the concession area at RM7,000 per acre in the amount of RM1,148,000. Other than that, TCY also admitted that I

it had paid the concession license and road permit to the Forestry Department. All receipts of payments were acknowledged by TCY. See TCY's tax agent letter dated 11 December 2008 at p 204 CCB, 22 December 2008 at p 208 CCB and 6 January 2009 at pp 213 and 216 CCB, and 23 March 2009 at p 222 CCB, all in encl 15.

[28] Finally, we also look at the journal voucher dated 31 August 2004 which can be seen at p 291 CCB in encl 15. As documented in the journal voucher, it is crystal clear that the payment made is for the purchase of timber concession, not for timber or standing logs. For ease of reference, the journal voucher is as follows:

JOURNAL VOUCHER

No: JV 15/8

	頁 Folio 码	去 Debit 项		来 Credit 项	
Purchase : Timber Concession	6000/97A	1148,000	00		
Keck Eng Timber	4001/151			1148,000	00
Being provision for the	purchase	of	timber		
concession of 164 acs	@ RM7000.00	per	acs		

Prepared by: _____ Date: 31/8/04

Authorised by: _____ Posted by: _____

[29] Looking at the contemporaneous evidence, we are of the considered view that the SCIT's finding of fact in sub-para 8(ix) of the case stated is correct as compared to the facts found in sub-para 8(vii), that is, TCY had purchased the timber concession from KET. Our view is in line with the nature of the right given to TCY in the said agreement. The exclusivity of the right given to TCY to extract and remove all merchantable timber from the concession area is akin to the right of a concessionaire. Coupled with the fact that the amount to be paid by TCY to KET is in a fixed sum regardless of the number of the standing logs available in the concession area, negates the proposition that the said agreement is for the purchase of timber or standing logs.

[30] Moreover, the condition that TCY must bear all expenses for the logging license issued by the State Forestry Department, and the fact that TCY did pay for all the expenses including the royalty and the premium for the concession area, the concession licence and road permit further strengthen our

view that TCY had purchased the timber concession and not merely purchasing the standing logs from KET. Above all, the journal voucher issued in the transaction clearly stated that the payment was a provision for the purchase of the timber concession.

[31] Besides that, TCY through its tax agent had lucidly admitted that the said agreement is to purchase the timber concession. This can be seen in TCY's tax agent's earlier letters of appeal to the DGIR. Only after knowing that the payment to purchase a timber concession is not allowable for deduction under the tax law did TCY change its stand. On this matter, the legal maxim of law on estoppel — *allegans contraria non est audiendus* or 'he who alleges contradictory things is not to be heard' shall apply. In the case of *Yamamori (Hong Kong) Ltd v Davidson & Ors* [1992] 2 MLJ 410 at p 418, Ian HC Chin JC (as he then was) refers to *Broom's Legal Maxims* (1st Ed) at p 103 where it is stated as follows:

> This elementary rule of logic, which is frequently applied in our courts of justice, will receive occasional illustration in the course of this work. We may for the present observe that it expresses, in other language, the trite saying of Lord Kenyon, that a man shall not be permitted to 'blow hot and cold' with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interest.

Halsbury's Laws of England (4th Ed) at para 1507 stated that:

> *Approbation and reprobation*. On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel *in pais*. The principle that a person may not approbate and reprobate expresses two proposition: (1) that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile; and (2) that he will not be granted, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.

In *Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal* [2011] 6 MLJ 297; [2011] 8 CLJ 766 the Federal Court cited with approval the English Court of Appeal's decision in *Verschures Creameries, Ltd v Hull and Netherlands Steamship Co, Ltd* [1921] All ER Rep 215; [1921] 2 KB 608 wherein Scrutton LJ held:

> A plaintiff is not permitted to 'approbate and reprobate'. The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election — namely, that no party can accept and reject the same instrument: *Ker v Wauchope* (1); *Dougias-Menzies v Umphelby* (2). The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void

A for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.

Therefore, TCY shall not be permitted to 'blow hot and cold' or 'approbate and reprobate' to suit its own private interest, that is, to escape from paying tax.

B

[32] Based on the said reasons, we reiterate that the SCIT's finding of fact in sub-para 8(ix) is perfectly correct. TCY had purchased the timber concession from KET and not the timber or the standing logs. Thus, even though the disputed payments can be considered as outgoings and expenses wholly and C exclusively incurred in the production of gross income, and claimable for deduction of tax under sub-s 33(1) of the ITA 1967, regard must be made to the restriction as stipulated under para 39(1)(g) of the ITA 1967.

SECOND ISSUE — THE RESTRICTION UNDER PARA 39(1)(g) OF D THE ITA 1967

[33] The SCIT's finding of fact in sub-para 8(xi) of the case stated shows that the learned SRC who represents the DGIR had dropped the issue of whether the disputed payments are capital in nature and therefore was not allowed E under para 39(1)(g) of the ITA 1967. In other words, the learned SRC had abandoned the issue on the applicability of para 39(1)(g) of the ITA 1967 in TCY's appeal before the SCIT. In his submission before us, the counsel for TCY had specifically stressed that the DGIR could not revisit the issue that had been abandoned before the SCIT and was not argued before the High Court. F The learned SRC admitted and acknowledged the said fact. However, the learned SRC did submit before us that para 39(1)(g) of the ITA 1967 shall apply to the disputed payments. Therefore, the question before us is whether the principle of estoppel apply against DGIR in such a situation.

G

[34] The law on *estoppel in pais*, that is estoppel by words or conduct against the statutory provision is well settled. There are numerous high authorities decided on this matter. Among others, in *Puran Singh v Kehar Singh; Bahadur Singh* [1939] 1 MLJ 71, Thomas CJ held as follows:

H

> The main question argued at the appeal was that the learned trial Judge having held that the registration of Kehar Singh as proprietor of certain lands had been obtained by means of an insufficient or void instrument, viz., an invalid power of attorney, and that it was in consequence void under s 42 (iii) of the Land Code, he was wrong in holding that the plaintiff was estopped by his conduct from objecting to the I registration. In support of this contention, he cited *Borrow's* case (1880) 14 Ch D 432 in which it is stated by Bacon, VC, in the course of his judgment that:
>
> > ... the doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract inter partes and it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament.

> This view is followed in the case of *Abdul Aziz v Kanthen Mallik* 38 ILR Cal 512 515 in which at p 515, a long list of authorities has been set out. The court there decided that it was not prepared to accede to the argument that the principle of estoppel overrides the provisions of either s 78 of the Land Registration Act or s 60 of the Bengal Tenancy Act.

In *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] 1 MLJ 49; [1964] 1 All ER 300, the Privy Council had considered the plea of estoppel in the face of a statute and held as follows:

> The respondent has invoked in support of its defence a principle which appears in our law in many forms, that a party cannot set up an estoppel in the face of a statute. Thus, a corporation on which there is imposed a statutory duty to carry out certain acts in the interest of the public cannot preclude itself by estoppel *in pais* from performing its duty and asserting legal rights accordingly. See *Maritime Electric Co Ltd v General Dairies Ltd* and *Southend-on-Sea Corpn v Hodgson (Wickford) Ltd*. Given a 'statutory obligation of an unconditional character' it is not open to the court to allow the party bound by that obligation to be barred from carrying it out by the operation of an estoppel. Similarly, there is, in most cases, no estoppel against a defendant who wishes to set up the statutory invalidity of some contract or transaction on which he is being sued, despite the fact that by conduct or other means he would otherwise be bound by estoppel; see *Re a Bankruptcy Notice*, in particular per Atkin LJ ([1924] 2 Ch at p 96).

Supreme Court in *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 404 at p 407; [1991] 1 CLJ Rep 174 at p 179, held that:

> On the question of issue estoppel, we agree with the learned judge that on the facts of this case the appellants cannot invoke the doctrine of issue estoppel. There can be no estoppel as against statutory provisions ...

In *Teruntum Theatre Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2006] 4 MLJ 685, commenting on the same issue, the Court of Appeal had this to say:

> [18] Estoppel is a rule of evidence which can only be invoked in special circumstances. The estoppel relied upon by the taxpayer against revenue in this case is that of estoppel *in pais*, ie estoppel by words or conduct. In our view, the Special Commissioners were not wrong to reject the suggestion that the assessment by the respondent of a taxpayer under the RPGT was an irrevocable act. Estoppel cannot be invoked against the Director General of Income Tax when he is put to notice that an incorrect assessment has been made under the RPGT. The Director General cannot raise an estoppel against himself from discharging his statutory duty to raise a correct assessment under the appropriate law if the basis of treating the gain as a capital gain was not within the meaning ascribed to it by the RPGT and no real property gains tax is payable. In such a situation, the Director General is not absolved from discharging his duty of raising the correct assessment in accordance with the relevant law. No person can raise an estoppel against himself so as to defeat a positive duty imposed upon him by a statute (*Maritime Electric Co Ltd v General Diaries Ltd* [1937] AC 610 at pp 620–621), the duty of both parties, the Director General and the taxpayer, is to obey the law.

Guided by the clear settled principle of law enunciated in those authorities, we find that the learned SRC who represented DGIR is not estopped from raising the issue of the restriction stipulated under para 39(1)(g) of the ITA 1967 even though the matter was abandoned before the SCIT and also not argued before the High Court.

[35] Based on our reasoned finding that the SCIT had made a correct finding of fact in sub-para 8(ix) of the case stated, the disputed payments fall under the category of any sum paid for the use of a licence or permit to extract timber from the concession area. Thus, TCY is prohibited from claiming deduction under sub-s 33(1) of the ITA 1967 by virtue of para 39(1)(g) of the ITA 1967.

[36] In such a situation, we find that the LHCJ had failed to exercise his appellate function to consider and decide on the question of law, that is, whether the SCIT had correctly addressed the law in determining whether TCY is entitled to deduct the disputed payments as its cost of producing gross income under sub-s 33(1) of the ITA 1967 by virtue of the restriction under para 39(1)(g) of the ITA 1967. We agree with the learned SRC's contention that both the SCIT and the High Court had erred in law by arriving at a conclusion not supported by the facts found and thereby, applying the wrong provision of law in determining the appeal.

PENALTY UNDER S 113 OF THE ITA 1967

[37] Finally, we will address the issue of the penalty imposed by the DGIR against TCY. The law on the penalty imposed on the incorrect returns sent by the taxpayer to the DGIR is trite. Section 113 of the ITA 1967 provides as follows:

> 113 Incorrect returns
>
> (1) Any person who —
>
> (a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or
>
> (b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,
>
> shall, unless he satisfies the court that the incorrect return or incorrect information was made or given in good faith, be guilty of an offence and shall, on conviction, be liable to a fine of not less than one thousand ringgit and not more than ten thousand ringgit and shall pay a special penalty of double the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct.
>
> (2) Where a person —

(a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,

then, if no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information, the Director General may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct; and, if that person pays that penalty (or, where the penalty is abated or remitted under subsection 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1).

Under sub-s 113(2), if a taxpayer is not prosecuted, the DGIR may require the taxpayer to pay a penalty equal to the amount of tax that was undercharged due to the incorrect returns. In other words, the DGIR has discretionary power to impose penalty up to 100% of the amount of tax due, a discretion that cannot be exercised at whim and fancy. See Supreme Court decision in *Ketua Pengarah Hasil Dalam Negeri v Kim Thye & Co* [1992] 2 MLJ 708.

[38] From the facts, it is not disputed that the filing of incorrect returns by TCY in YA 2004 and 2005 was discovered during the tax audit by the DGIR at TCY's business premises in Segamat, Johor which was held from 5 November 2007 to 7 November 2007. By the nature of the business transaction with KET, that is, TCY had bought the timber concession and was under obligation to pay all expenses including the licence fee to extract the timber, TCY should have known that the disputed payments were prohibited from claiming deduction as provided under para 39(1)(g) of the ITA 1967. It is a general legal principle that ignorance of the law is no defence — *ignorantia juris non excusat*. TCY cannot claim ignorance of the clear provision of law.

[39] Furthermore, good faith is not a defence against the imposition of penalty under sub-s 113(2) of the ITA 1967. The Court of Appeal decision in *Syarikat Ibraco-Peremba Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2017] 2 MLJ 120 at p 139 held that:

[38] It is without doubt that s 113(2) of the Act gives a discretion to the respondent to impose a penalty on a person who has failed to observe the requirements of the law as provided in para 2(a) or (b) of s 113. Hence the use of the phrase 'the Director General may require that person to pay a penalty'. There is a clear distinction between sub-s 113(1) and sub-s 113(2). Although paras 113(1)(a) and (b) and paras 113(2)(a) and (b) are almost identical, but the effect of sub-s 113(1) is different from sub-s 113(2). Sub-section 113(1) provides for an offence being committed in the circumstance provided for in para (a) or (b) unless that person 'satisfies the court

A that the incorrect return or incorrect information was made or given in food faith'. Whereas sub-s 113(2) provides for a situation where there is no prosecution under sub-s 113(1) has been instituted in the circumstances provided for in para 113(2)(a) or (b), the Director General may require that person to pay a penalty. That being the case, the defence of 'good faith' as found in sub-s 113(1), and not found in sub-s 113(2), does not apply to the Director General's discretion under sub-s 113(2). We therefore disagree with the appellant's submission on this score.

B

See also the Court of Appeal decision in *Ketua Pengarah Hasil Dalam Negeri v Classic Japan (M) Sdn Bhd* [2022] 3 MLJ 894 at pp 916–917.

C **[40]** Having considered the facts and the applicable law on this issue, we find that the DGIR had correctly exercised his discretion pursuant to sub-s 113(2) of the ITA 1967. We do not find any reason to disturb the DGIR's discretion in imposing a penalty of 45% for incorrect returns, instead of 100% allowable under the law.

D

CONCLUSION

[41] For the above reasons, we are unanimous in our decision that there are merits in the DGIR's appeal which warrant appellate intervention. We therefore allow the DGIR's appeal and set aside both the judgment of the High Court and the decision of the SCIT with cost of RM20,000 here and below to be awarded to DGIR subject to the allocator.

E

F *DGIR's appeal allowed; judgment of High Court and decision of SCIT set aside with cost of RM20,000 here and below to be awarded to DGIR subject to allocator.*

Reported by Dzulqarnain Ab Fatar

G

H

I